2013 WL 8214485 (Ill.App. 4 Dist.) (Appellate Brief)
Appellate Court of Illinois, Fourth District.

In Re the Matter of: Mary SLEPICKA, by and through Joann Kaminski, her agent and Attorney-in-Fact, Plaintiff-Appellant,
v.
ILLINOIS DEPARTMENT OF PUBLIC HEALTH, Teresa Garate, Ph.D., Lamar Hasbrouck, MD, Mph, and Holy Family Villa, Defendants-Appellees.

No. 2012-1103.
April 16, 2013.

Appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois
Circuit No. 2012-MR-743
Honorable John Schmidt, Judge Presiding
On Complaint for Administrative Review from the Illinois Department of Public Health

Holy Family Villa's Response Brief on Appeal

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***i** POINTS AND AUTHORITIES

*1 *ISSUES PRESENTED FOR REVIEW*

Whether the Final Order of the Illinois Department of Public Health ordering the involuntary transfer and discharge of a resident who resides in a distinct part of a skilled nursing and intermediate care facility which does not participate in Medicaid, and who failed to pay for her private pay stay while in a private pay bed, should be affirmed?

Whether this appeal is moot due to the subsequent payment by Plaintiff of all amounts owed to the facility which prevents the facility from involuntarily transferring or discharging the resident?

Whether the Circuit Court for the Seventh Judicial Circuit, Sangamon County, lacked subject matter jurisdiction over Plaintiffs Complaint for Administrative Review when the entire proceeding culminating in the decision of the administrative agency was held in Cook County, the subject matter of the hearing was situated in Cook County, and the transaction giving rise to the proceeding took place in Cook County?

***2 STATUTES AND REGULATIONS INVOLVED**

210 ILCS § 45/3-401.1(a-5).

After the effective date of this amendatory Act of 1997, a facility of which only a distinct part is certified to participate in the Medical Assistance Program [Medicaid] may refuse to retain as a resident any person who resides in a part of the facility that does not participate in the Medical Assistance Program and who is unable to pay for his or her care in the facility without Medical Assistance only if:

(1) the facility, no later than at the time of admission and at the time of the resident's contract renewal, explains to the resident (unless he or she is incompetent), and to the resident's representative, and to the person making payment on behalf of the resident for the resident's stay, in writing, that the facility may discharge the resident if the resident is no longer able to pay for his or her care in the facility without Medical Assistance;

(2) the resident (unless he or she is incompetent), the resident's representative, and the person making payment on behalf of the resident for the resident's stay, acknowledge in writing that they have received the written explanation.

42 C.F.R. § 483.5 Definitions.

(a) Facility defined. For purposes of this subpart, facility means a skilled nursing facility (SNF) that meets the requirements of sections 1819(a), (b), (c), and (d) of the Act, or a nursing facility (NF) that meets the requirements of sections 1919(a), (b), (c), and (d) of the Act. “Facility” may include a distinct part of an institution (as defined in paragraph (b) of this section and specified in § 440.40 and § 440.155 of this chapter), but does not include an institution for individuals with intellectual disabilities or persons with related conditions described in § 440.150 of this chapter. For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the “facility” is always the entity that participates in the program, whether that entity is comprised of all of, or a distinct part of, a larger institution. For Medicare, an SNF (see section 1819(a)(1) of the Act), and for Medicaid, an NF (see section 1919(a)(1) of the Act) may not be an institution for mental diseases as defined in § 435.1010 of this chapter.

***3** 42 C.F.R. § 483.12 Admission, transfer and discharge rights. [1]

Note: Text of footnote 1 missing in original document

(a) Transfer and discharge -

(1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.

(2) Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless-

(i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(ii) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(iii) The safety of individuals in the facility is endangered;

(iv) The health of individuals in the facility would otherwise be endangered;

(v) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or

(vi) The facility ceases to operate.

***4 STATEMENT OF FACTS**

Holy Family Villa operates at capacity and, at all relevant times, had a waiting list of approximately 200 individuals. (C. 440). Mary Slepicka ("Slepicka" or "Plaintiff") applied for admission to Holy Family Villa on February 8, 2011, and was admitted on March 29, 2011. (C. 239 and C. 190). Slepicka was initially admitted for skilled care under Medicare Part A. *Id.* She was admitted to Room 222-A, a bed that was certified for Medicare, but not certified for Medicaid. (C. 188; C. 236; C. 239).

On April 10, 2011, Slepicka's stay was no longer eligible for Medicare reimbursement. (C. 392). According to Slepicka's Application for Admission, she had approximately $240,000 in assets, plus social security income of $1,061 per month. (C. 239). Slepicka's attorney-in-fact and long-time friend, Joann Kaminski ("Kaminski"), agreed to convert Slepicka's stay at Holy Family Villa to a private pay stay because Slepicka had sufficient assets to pay for her care for the next three years. (C. 207; C. 239; C. 435 - C. 436). Thus, Slepicka remained in her private-pay bed in Room 222, and Kaminski signed a private pay Contract Between Resident and Holy Family Villa ("Contract") as Slepicka's attorney-in-fact. (C. 207).

Julie Regan ("Regan"), Holy Family Villa's Admissions and Social Service Director, testified that one of the reasons Holy Family Villa collects **financial** information on prospective new residents is to determine the appropriate placement for the resident. (C. 432). Since Slepicka was initially admitted under Medicare and she had sufficient assets and income to cover the cost of her care for at least three years, she was admitted to a bed that was certified for Medicare but not certified for Medicaid. (C. 188; C. 236; C. 239). Slepicka and Kaminski were told that the bed was not Medicaid-certified on ***5** numerous occasions, including the day of admission. (C. 398; C. 399-401; C. 456-457; C. 224; C. 234; C. 239; C. 247; C. 249).

All of Holy Family Villa's beds are certified for Medicare, but only a distinct part of Holy Family Villa, *i.e.*, 65 of its 99 beds, is certified to participate in Medicaid. (C. 474-475; C. 236). Holy Family Villa is not permitted to bill Medicaid for care provided to residents who do not reside in Medicaid-certified beds. (C. 236). As residents begin to exhaust funds, the facility encourages them to apply for Medicaid and puts them on the waiting list for a Medicaid-certified bed. (C. 440; C. 457). It is not unusual for residents or families to apply for Medicaid eligibility while they still have significant assets because they can be approved for Medicaid benefits after a spend-down period. (C. 457).

In July 2011, Kaminski inquired of Holy Family Villa regarding applying for Medicaid for Slepicka. (C. 454). This is a free service that Holy Family Villa provides to all residents. (C. 457; C. 495). Vida Wojewski ("Wojewski"), the person at Holy Family Villa who assists with Medicaid applications, sent a letter to Kaminski identifying the information the facility would

need to apply for Medicaid for Slepicka. (C. 244). Based upon Slepicka's application and the information Kaminski provided to the facility, it appeared that Slepicka would have a spend-down period through early 2014. (C. 239; C. 435-436). On July 26, 2011, Kaminski met with Wojewski regarding the Medicaid application. (C. 465). Kaminski brought some of Slepicka's **financial** information, and included in the documents was a check for $10,000 that Kaminski wrote to herself out of Slepicka's account. (C. 47; C. 465). Wojewski told Kaminski that she should void the check because it was an illegal transfer under the Medicaid rules. (C. 247; C. 465). Kaminski responded that Slepicka wanted her to have the money. (C. 466). Kaminski ***6** left, taking the **financial** records with her. (C. 463). Wojewski followed up with Kaminski by letter after the meeting, telling her to void the $10,000 check and confirming that "Mary is in a non-certified public aid bed; she remains private pay until a certified bed becomes available." (C. 247). After that, Kaminski refused to work with Holy Family Villa in preparing the Medicaid application for Slepicka., and never provided the **financial** information necessary to prepare the application (C. 463; C. 466).

About a month and a half later, on September 7, 2011, Kaminski sold Slepicka's house for approximately $156,000. (C. 490-492). The next day, she cashed the $10,000 check that Wojewski told her to void. (C. 494). Later in September 2011, Kaminski went to a **financial** planner in Springfield, Joseph Oettel ("Oettel"). (C. 517-518). Kaminski paid Oettel $8,400 to apply for Medicaid for Slepicka. (C. 513-514). Oettel transferred $137,000 of Slepicka's money into a trust - with Kaminski as the beneficiary - for the sole purpose of qualifying Slepicka for Medicaid immediately, instead of after a spend-down. (C. 496). Kaminski, now the sole beneficiary of all of Slepicka's assets, finally returned the $10,000 to Slepicka's bank account. (C. 498-499).

Audrey Sparks ("Sparks"), Holy Family Villa's Fiscal Manager, spoke to Oettel on the telephone on September 30, 2011. Sparks asked about Slepicka's income, and Oettel told her that she "did not need to know that." Sparks then asked about Slepicka's assets, and Oettel told her "not to worry about that." (C. 650). Thus, while Holy Family Villa knew that Kaminski was interested in applying for Medicaid for Slepicka, it had no knowledge that Slepicka secretly sequestered all of her assets into a trust to avoid paying for her stay at the facility. (C. 440-441; C. 458; C. 471-472; C. 478; C. 503-504; C. 637; C. 640; C. 650; Ex. A). Kaminski admitted this at the hearing. (C. 266).

***7** Slepicka's stay at Holy Family Villa was paid in full through the end of September 2011. (C. 224; C. 395). However, beginning in October 2011, based upon Oettel's advice, Kaminski reduced the payments to Holy Family Villa, causing a past due balance of 13,776.65 to accrue by March 4, 2012. (C. 224; C. 395). Slepicka was transferred into a Medicaid-certified bed on March 4, 2012. (C. 643). Once in a Medicaid-certified bed, Slepicka was billed at the facility's Medicaid rate, but her unpaid balance continued to grow, from $13,776.65 on March 4, 2012 to $15,749.88 on May 18, 2012. (C. 224; C. 394).

On January 24, 2012, Holy Family Villa issued a Notice of Involuntary Transfer or Discharge and Opportunity for Hearing to Slepicka ("Notice of Involuntary Discharge"). (C. 631). Slepicka timely requested a hearing. On May 24, 2012, a full evidentiary hearing was held before the Illinois Department of Public Health's ("IDPH" or "Department") Administrative Law Judge Omayra Giachello ("ALJ Giachello"). (C. 373). On August 29, 2012, the Department's Director issued a Final Order ("Final Order") affirming ALJ Giachello's Report and Recommendation to transfer or discharge Slepicka for nonpayment of the private pay portion of her care. (C. 369). Slepicka filed a Complaint for Administrative Review in the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois. The Circuit Court affirmed the Department's Final Order on November 28, 2012. (C. 712).

On January 8, 2013, during the pendency of this appeal, Kaminski paid the past due balance in full. (Supplementary Appendix ("SA") 13). Thus, Slepicka is no longer subject to involuntary transfer or discharge.

***8 ARGUMENT**

I. Standard of review.

Despite the fact that Slepicka argues for a *de novo* standard of review, she raises a number of factual questions at pages 13 through 17 of Appellant's Brief ("Brief"). It is well settled that an administrative agency's findings and conclusions on questions of fact are deemed to be *prima facie* true and correct, and this Court is limited to ascertaining whether such findings are against the manifest weight of the evidence. *City of Belvidere v. Ill. State Labor Rels. Bd.*, 181 Ill. 2d 191, 204, 692 N.E.2d 295, 302 (1998); 735 ILCS § 5/3-110. An administrative agency's factual determinations are against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *City of Belvidere*, 181 Ill. 2d at 204. "The mere fact that an opposite conclusion is reasonable or that this court might have ruled differently does not justify reversal of the administrative findings and decision." *Maun v. Dep 't of Prof'l Regulation*, 299 Ill. App. 3d 388, 402, 701 N.E.2d 791, 801 (4th Dist. 1998). As discussed in Section V, the Final Order is amply supported by the evidence, and the Department did not make any material factual errors.

Slepicka also challenges IDPH's application of the law to the established facts of this case. Accordingly, the proper standard of review is the "clearly erroneous" standard because neither the facts nor the rule of law are in dispute. *Cinkus v. Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 211, 886 N.E.2d 1011, 1018 (2008). In other words, this case presents a mixed question of fact and law. *Id.*
Mixed questions of fact and law "are 'questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."'

***9** *Cinkus*, 228 Ill. 2d at 211, *quoting American Federation of State, County & Municipal Employees v. Ill. Labor Rels. Bd. State Panel*, 216 Ill. 2d 569, 577, 839 N.E.2d 479, 485 (2005) and *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19, 72 L. Ed. 2d 66, 80 n.19, 102 S. Ct. 1781, 1790 n.19 (1982).

An administrative agency's decision is deemed clearly erroneous when the reviewing court is left with the "definite and film [sic] conviction that a mistake has been committed." *Cinkus*, 228 Ill. 2d at 211; *quoting AFM Messenger v. Dep't of Emp't Sec.*, 198 Ill. 2d 380, 395, 763 N.E.2d 272, 282 (2001). Moreover, a reviewing court must accord substantial discretion to an administrative agency in the construction of its own rules. *People v. Hall*, 314 Ill. App. 3d 688, 692, 732 N.E.2d 742, 746 (4th Dist. 2000). As discussed in Section II, the Final Order properly applied Illinois and federal law in ordering the involuntary transfer and discharge of Slepicka. Accordingly, the Final Order should be affirmed.

While the merits of this case favor Holy Family Villa and affirmance of the Final Order, there are two procedural issues that would obviate the necessity of addressing the merits of this appeal: mootness and lack of subject matter jurisdiction. In Section VI, Holy Family Villa explains that this appeal is moot because Slepicka has paid all amounts owed and, therefore, she cannot be involuntarily transferred or discharged. In Section VII, Holy Family Villa explains that the Circuit Court lacked subject matter jurisdiction because Slepicka chose to appeal in Sangamon County, rather than in Cook County where the hearing took place, the subject matter involved was situated, and the transaction occurred. Either of these issues is independently dispositive, and justifies dismissal of this appeal.

***10 II. The Final Order is supported by the evidence.**

A resident of a skilled nursing facility, such as Holy Family Villa, can be involuntarily transferred or discharged for late or non-payment of her stay at the facility. 210 ILCS § 45/3-401(d); 42 C.F.R. § 483.12(a)(2)(v). In the court below, Slepicka relied upon Illinois law for her challenge to the Final Order. In this Court, she relies upon federal law. Since Slepicka had not paid for a portion of her stay by the time the Final Order was entered, her involuntary transfer and discharge was authorized under either Illinois or federal law. As discussed in Section VI, Slepicka could pay the outstanding balance at any time before her actual discharge and have the right to remain in Holy Family Villa, which she did. The subsequent payment does not change the fact that the Department ruled correctly in ordering Slepicka's involuntary transfer and discharge.

A. Illinois law authorizes Slepicka's involuntary transfer and discharge.

Where, as here, only a distinct part of a facility is certified to participate in Medicaid, a resident who fails to pay for her care in the non-Medicaid certified part may be involuntarily discharged. The Nursing Home Care Act ("Act") provides:
After the effective date of this amendatory Act of 1997, a facility of which only a distinct part is certified to participate in the Medical Assistance Program [Medicaid] may refuse to retain as a resident any person who resides in a part of the facility that does not participate in the Medical Assistance Program and who is unable to pay for his or her care in the facility without Medical Assistance only if:

(1) the facility, no later than at the time of admission and at the time of the resident's contract renewal, explains to the resident (unless he or she is incompetent), and to the resident's representative, and to the person making payment on behalf of the resident for the resident's stay, in writing, that the facility may discharge the resident if the resident is no longer able to pay for his or her care in the facility without Medical Assistance;

(2) the resident (unless he or she is incompetent), the resident's representative, and the person making payment on behalf of the ***11** resident for the resident's stay, acknowledge in writing that they have received the written explanation.

210 ILCS § 45/3-401.1(a-5).

As required by Section 3-401.1(a-5) of the Act, Slepicka and Kaminski were notified both at the time of admission and when Kaminski executed the private pay Contract that Slepicka would be discharged if she could not pay for her stay without Medicaid. (C. 190; C. 207). Kaminski, on Slepicka's behalf, acknowledged receipt of both contracts. *Id.* In addition, Kaminski and Slepicka were told that Slepicka was being admitted to a bed that was not certified for Medicaid. (C. 242). None of these facts are disputed, nor is the fact that, as of the date of the administrative hearing, Slepicka failed to pay $15,749.88 to Holy Family Villa for her care between October 1, 2011 and May 18, 2012. These facts support the Department's Final Order.

In the Circuit Court, Plaintiff argued that Section 3-401.1(a-5) of the Act no longer applies because Slepicka has been transferred to a Medicaid-certified bed. This argument fails for two reasons. First, the involuntary transfer or discharge related primarily to the time that Slepicka resided in a private pay, non-Medicaid certified, bed. Plaintiff claimed that she was unable to pay Holy Family Villa's private pay rate for this period (between October 1, 2011 and March 3, 2012). The Department correctly applied the law and determined that Slepicka should be involuntarily transferred or discharged for her failure to pay. The Department's interpretation of the Act is entitled to deference from this Court. *Hall*, 314 Ill. App. 3d at 692.

Second, Slepicka's past due balance continued to grow even after she was transferred into a Medicaid-certified bed. Between to March 4, 2012 and May 18, 2012, her past due balance grew by $2,000. (C. 377). There is no prohibition from ***12** involuntarily transferring or discharging a Medicaid-eligible resident, residing in a Medicaid-certified bed, who fails to pay her share of her Medicaid stay.

B. Federal law authorizes Slepicka's involuntary transfer and discharge.

Slepicka argues that she overpaid Holy Family Villa because she paid more than the resident liability determined by the Illinois Department of Healthcare and Family Services ("IDHFS"). (Brief at pp. 16-19). This argument is flawed, because the resident liability identified by the IDHFS is the amount that Slepicka would have to pay only if she resided in a Medicaid-certified bed. Federal law distinguishes between certified and non-certified beds, and authorizes the involuntary discharge of a resident who fails to pay the applicable amount owed. 42 U.S.C. § 1396r; 42 C.F.R. § 483.12(a)(2)(v); and 42 C.F.R. § 483.5(a).

The federal regulation regarding involuntary transfer and discharge provides that a facility may involuntarily transfer or discharge a resident who:

> ... has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid;

42 C.F.R. § 483.12(a)(2)(v). There is no question that Medicaid will not pay for Slepicka's stay while she resided in a non-Medicaid certified bed. Since Slepicka failed to pay, or to have Medicaid pay, for her stay from October 1, 2011 through March 3, 2012, the first sentence of Section 483.12(a)(2)(v) authorizes Slepicka's involuntary discharge and transfer.

Slepicka's brief ignores the first sentence of Section 483.12(a)(2)(v) and focuses exclusively on the second sentence regarding the amount of allowable charges. However, ***13** Slepicka misinterprets and misapplies the regulation by ignoring the definition of "facility." "Facility" is given a context-specific meaning:

> (a) Facility defined. For purposes of this subpart, facility means a skilled nursing facility (SNF) that meets the requirements of sections 1819(a), (b), (c), and (d) of the [Social Security] Act, or a nursing facility (NF) that meets the requirements of sections 1919(a), (b), (c), and (d) of the [Social Security] Act. **"Facility" may include a distinct part of an institution** (as defined in paragraph (b) of this section and specified in § 440.40 and § 440.155 of this chapter), but does not include an institution for individuals with intellectual disabilities or persons with related conditions described in § 440.150 of this chapter. **For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the "facility" is always the entity that participates in the program, whether that entity is comprised of all of, or a distinct part of, a larger institution.** For Medicare, an SNF (see section 1819(a)(1) of the [Social Security] Act), and for Medicaid, an NF (see section 1919(a)(1) of the [Social Security] Act) may not be an institution for mental diseases as defined in § 435.1010 of this chapter.

42 C.F.R. § 483.5(a) (emphasis added).

The definition recognizes two types of certified facilities: those that are certified under Medicare (Section 1819 of the Social Security Act), and those that are certified under Medicaid (Section 1919 of the Social Security Act). The term "facility" refers only to that distinct part that participates in the applicable federal program - here, Medicaid. *See, Schoolcraft Mem. Hosp. v. Mich. Dep't of Cmty. Health*, 570 F. Supp. 2d 949, 954 (W.D. Mich. 2008) (analyzing the term "facility" in Section 483.12(a)(2) with respect to swing beds in hospitals). Thus, the term "facility" in the regulation means Holy Family Villa's Medicaid-certified distinct part. Slepicka was transferred into Holy Family Villa's Medicaid-certified distinct part on March 4, 2011. Prior to that date, Slepicka resided in a distinct part of Holy Family Villa that was certified only for Medicare, not Medicaid.

***14** Slepicka's argument improperly confuses the two parts, and seeks to impose Medicaid rules upon the non-Medicaid-certified entity (or part) of Holy Family Villa. When the definition of facility is properly applied to Section 483.12(a)(2)(v), the second sentence reads as follows:

> ... For a resident who becomes eligible for Medicaid after admission to a *Medicaid-certified distinct part of a facility, the Medicaid-certified distinct part* of a facility may charge a resident only allowable charges under Medicaid

This is the only possible reading of the regulation that makes sense under Medicaid reimbursement rules. Both IDHFS and IDPH have interpreted the law to provide for Medicaid reimbursement *only* for residents residing in Medicaid-certified beds. (C. 236-37; C. 10). IDHFS explained this to Holy Family Villa by letter in 2009, and IDPH confirmed this in its ruling in this

case. *Id.* That is because Slepicka was not in a "facility" that participated in the Medicaid program while residing in the non-certified bed in the non-Medicaid-participating part of Holy Family Villa. The agencies' interpretations are entitled to deference by this Court and result in a logical reading of Section 483.12(a)(2)(v), *i.e.*, the term "facility" used therein refers only to the Medicaid-certified portion of the facility under the circumstances presented by this case.

Slepicka became eligible for Medicaid before she was admitted to a Medicaid-certified bed. Accordingly, the second sentence of Section 483.12(a)(2)(v) does not apply, because, by its terms, it applies only if Slepicka becomes eligible for Medicaid after admission to the Medicaid-certified distinct of Holy Family Villa.

Slepicka appears to read the term "facility" as synonymous with "nursing home," such that Section 483.12(a)(2)(v) would read: "For a resident who becomes eligible for Medicaid after admission to a *nursing home*, the *nursing home* may charge a resident ***15** only allowable charges under Medicaid," regardless of whether the nursing home participates in the Medicaid program at all. Under the Medicaid program, the resident pays for a portion of her stay a Medicaid-certified "facility," and Medicaid pays the remainder of the facility's Medicaid rate. Using Slepicka's reading of Section 483.12(a)(2)(v), Slepicka would be required to pay only her share of Holy Family Villa's Medicaid rate, and Holy Family Villa would be prevented from seeking the remainder of its Medicaid rate from IDHFS or Slepicka. Thus, Holy Family Villa would be placed in the untenable position of being required to provide care to Slepicka, and being prevented from seeking reimbursement for that care. Clearly, that is an absurd result because neither Slepicka nor Medicaid would be required to pay for the remaining portion of Slepicka's care. Illinois jurisprudence will not construe the law to produce an absurd result. *People v. Hanna*, 207 Ill. 2d 486, 498, 800 N.E.2d 1201, 1208 (2003).

Slepicka also suggests that Holy Family Villa issued an intentionally misleading Notice of Involuntary Discharge because the second sentence of Section 483.12(a)(2)(v) was not on the Notice form. However, the Notice is a form prescribed by IDPH, not one that was created by Holy Family Villa, and IDPH presumably knows the regulations it is designated to administer. There is no merit to this argument.

Slepicka was transferred into the Medicaid-certified portion of Holy Family Villa on March 4, 2012. Prior to that time, her stay was governed by her private-pay Contract. Since Slepicka failed to pay for a portion of her private-pay stay, the Final Order correctly ordered her involuntary transfer and discharge.

***16 III. Slepicka exploited the law to secretly manipulate her finances to qualify for Medicaid while retaining her assets.**

Since both Illinois and federal law authorize Slepicka's involuntary transfer and discharge for non-payment, she distorts the facts in an effort to prey upon this Court's sympathies. Slepicka accuses Holy Family Villa of "manipulat[ing] its bed assignments to deprive a resident of approved Medicaid benefits." (Brief at p. 2). In fact, it is Slepicka who manipulated her **finances** in order to qualify for Medicaid instead of paying Holy Family Villa out of her own funds. In order to shield her money from Medicaid, Slepicka put it into a trust with Kaminski as the sole beneficiary at Slepicka's death. Illinois has now closed this loophole, and requires that Medicaid be repaid with the remaining funds at the individual's death. 89 Ill. Admin. Code § 120.388. Slepicka's trust has no such Medicaid repayment provision. (C. 503).

Slepicka's manipulation is representative of a much larger issue affecting Medicaid programs nationwide. In 1965, Congress enacted the Medicaid Act (Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*) to help the indigent obtain health care. *Vincent v. Dep't of Human Servs.*, 392 Ill. App. 3d 88, 89, 910 N.E.2d 723, 724 (3d Dist. 2009), citing *Gillmore v. Ill. Dep't of Human Servs*, 218 Ill. 2d 302, 304-05, 843 N.E.2d 336, 300 Ill. Dec. 78 (2006). Under the Medicaid Act, States design and administer their own Medicaid plans which are partially reimbursed by the federal government if they comply with requirements imposed by federal statutes and regulations. *Id.* Federal law requires that Medicaid recipients have insufficient income and resources to pay for their own medical expenses. 42 U.S.C. Ill396a(a)(10)(A)(ii). "Thus, the Medicaid Act expresses an intent by Congress that "[i]ndividuals are expected to deplete their own resources before obtaining assistance from the government."'

***17** Vincent, 392 Ill. App. 3d at 94. In order to circumvent the Medicaid resource calculation rules, **financial** planners devised the "Medicaid Qualifying Trust," which allowed an individual to place his or her assets in a trust to provide for the person's comfort while at the same time creating eligibility for Medicaid. *Id.* Congress condemned this practice, stating in a committee report recommending a change in the law:

> It has come to the attention of the Committee that some attorneys and **financial** advisors have suggested to the affluent clients that, as a matter of estate planning, they consider placing most of their assets into a specially designed irrevocable trust ***. The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying and similar 'techniques' to qualify for the program, they are diverting scarce Federal and State resources from low-income **elderly** and disabled individuals, and poor women and children. This is unacceptable to the Committee.

H.R. Rep. No. 99-265, at 71-72 (1985). Congress changed the law in 1988 to outlaw Medicaid Qualifying Trusts, just as Illinois changed the law in 2012 to outlaw the trust used by Slepicka to qualify for Medicaid. *See* 42 U.S.C. §1396a(k) (1988); 89 111. Admin. Code § 120.388.

Plaintiff argues that Holy Family Villa is somehow at fault for failing to transfer Slepicka into a Medicaid-certified bed before March 4, 2012; however, she does not explain exactly when (or why) the transfer should have taken place. By surreptitiously sequestering her assets, Slepicka was able to retroactively qualify for Medicaid effective June 1, 2011. However, only two months before that date, she entered into a private pay Contract with Holy Family Villa and had more than $200,000 in assets. Moreover, by June 1, 2011, neither Slepicka nor Kaminski had approached Holy Family Villa regarding ***18** Medicaid, neither had requested a transfer to a Medicaid-certified bed, and Slepicka had plenty of assets to cover her care for several years. If Holy Family Villa had transferred Slepicka into a Medicaid-certified bed on June 1, 2011, it would have violated exactly what Slepicka complains of here - placing a private pay resident in a Medicaid-certified bed.

Nevertheless, as early as July 26, 2011, Slepicka was placed on a waiting list for a Medicaid-certified bed. (C. 647). This fact was reiterated by Holy Family Villa's Administrator on November 2, 2011. (C. 623). Holy Family Villa cannot treat Slepicka differently, or give her preferential treatment, just because she is seeking Medicaid benefits. 42 C.F.R. § 483.12(c). Slepicka could have avoided this entire controversy by waiting to sequester her assets until after she was transferred into a Medicaid-certified bed. Of course, then she would not have been able to leave the remainder of her assets to Kaminski; rather, she would have been required to repay Medicaid.

Plaintiff also quotes extensively from an **Elder** Law Journal article without any analysis or application of the article to this case. (Brief at pp. 20-22). The article, which is nothing more than an advocacy piece, addresses circumstances where facilities fail to follow the regulations regarding involuntary discharge and fail to provide residents an opportunity to seek an administrative hearing. Such is not the case here, as is obvious, since this case is before this Court on administrative review.

IV. Slepicka's Contract required her to pay Holy Family Villa's private pay rate.

During the period of time that she was in a non-Medicaid certified bed, Medicaid does not apply. (See C. 638-39; 210 ILCS § 45/3-401.1(a-5), 305 ILCS § 5/5-1.1(a), 42 U.S.C. § 1396r, 42 C.F.R. § 483.12(a)(2)(v), and 42 C.F.R. § 483.5(a)). Slepicka did not reside in a Medicaid-certified bed until March 4, 2012. Thus, Plaintiff's argument that it ***19** is IDHFS rather than Holy Family Villa that determines the amount Slepicka owes for her care from June 1, 2011 through March 3, 2012 (while in a non-Medicaid certified bed) is simply wrong. The Contract controls that period of time. The undisputed fact remains that Slepicka owed Holy Family Villa $15,749.88 as of May 18, 2012. (C. 622; C. 394:12). Of that amount, approximately $2,000 accrued while Slepicka resided in a Medicaid-certified bed.

Kaminski signed two contracts on Slepicka's behalf, a Medicare contract on March 29, 2011 and a private pay Contract on April 10, 2011, when Slepicka's payor status changed. (C. 606). Both Illinois law and the facility's policies require a new resident contract whenever the individual's payor status changes from private to public funds or vice versa. (C. 435; 210 ILCS § 45/2-202; *see also* C. 207,¶4, which states that "when the source of payment for the Resident's care changes from private to public funds or from public to private funds, a new written contract shall be executed between the HOLY FAMILY and Resident and available Other Parties").

The April 10, 2011 private pay Contract was the Contract that was in force during the relevant time. Paragraph 5 of the Contract designates the funding source (here, private pay), and states that resident charges for a private pay resident are governed by Paragraph 7 of the Contract. Slepicka agreed to pay, in accordance with Paragraph 7, Holy Family Villa's private pay rate of $231 to $252 per day, plus the cost of Supplemental Goods and Services (as described therein). Moreover, Slepicka and Kaminski agreed to pay these charges by the tenth day of each month. Ex. 4, ¶ 7(e).

Plaintiff ignores her contractual obligations under Paragraph 7 and, instead, relies upon the payment terms for Medicaid beneficiaries under Paragraph 8. Paragraph 8 ***20** simply does not apply here. It is undisputed that Slepicka was a private pay resident when she signed the Contract. (C. 606). Slepicka agreed that she would execute a new contract if her payor status changed. (C. 606, ¶ 4). She also agreed that as a private pay resident she will be governed by Paragraph 7; not Paragraph 8 of the Contract. It is only after Slepicka transferred into a Medicaid-certified bed and signed a Medicaid contract that the terms contained in Paragraph 8 controlled.

V. None of the alleged factual errors change the outcome.

Slepicka argues on one hand that this case presents a pure legal issue that is subject to *de novo* review, and argues on the other hand that the Department made several "significant" factual errors. None of the alleged errors are significant or material to the outcome of this case. The Department's Final Order is more than adequately supported by the record and should be affirmed.

A. The error regarding the date Slepicka was approved for Medicaid is irrelevant.

First, Plaintiff complains that ALJ Giachello erred in finding that Slepicka was approved for Medicaid effective March 29, 2011. Br. at 13. Holy Family Villa concedes that this date is incorrect, but it is irrelevant to the outcome of this case. Slepicka's Medicaid approval date is irrelevant because: (i) it is undisputed that Holy Family Villa cannot bill Medicaid for a resident (here, Slepicka) who does not reside in a Medicaid-certified bed; (ii) it is undisputed that Slepicka did not reside in a Medicaid-certified bed until March 4, 2012; and (iii) it is undisputed that Slepicka did not pay $15,749.88 to Holy Family Villa for her care between October 1, 2011 and May 18, 2012, which is the basis for the involuntary transfer or discharge matter.

***21 B. IDPH did not err regarding the availability of Medicaid beds.**

Plaintiff next asserts that the ALJ erred in finding that "there were no Medicaid Beds available" from April 10, 2011 through March 3, 2012. Br. at 13. The only evidence cited by Plaintiff is the testimony of Roberta Magurany ("Magurany"), Holy Family Villa's Administrator. Magurany testified that while there were private pay resident(s) in Medicaid-certified beds, she did **not** "determine whether or not a Medicaid bed was available... [between June 1, 2011 and March 4, 2012], into which Mary Slepica [*sic*] could have been moved." (C. 485). Notably, Magurany did not testify that there were any *female* private pay residents in a Medicaid certified bed or room. Thus, there is *no evidence* that a certified bed was available to which Slepicka could have been transferred. Moreover, the evidence is unrefuted that Holy Family Villa was at capacity with a waiting list of 200 individuals. Slepicka, like all others, had to wait her turn for an available bed. As early as July 26, 2011, Wojewski told Kaminski that Slepicka "remains private pay until a certified bed becomes available," and on November 2, 2011, Magurany told Kaminski that

Slepicka "remains in a non-certified bed waiting for a certified bed." (C. 623). This is evidence that Slepicka was on the waiting list for a certified bed, and this Court can infer that there were no certified beds available *for Slepicka* until March 4, 2012.

Slepicka then argues that the facility "intentionally kept her in a private pay bed to **exploit** her **financially**." (Brief at p. 16). Again, there is no evidence in the record to support this outrageous allegation. It is Slepicka, Kaminski and Oettel who secretly manipulated Slepicka's **finances** to avoid paying her contractual obligations to Holy Family Villa. This is clearly shown in the record, which includes: Slepicka's Contract showing her promise to pay Holy Family Villa's private pay rate (C. 606), Slepicka's ***22** payment of $8,400 to Oettel to apply for Medicaid - a service the facility performs for free (C. 513-514), testimony that Kaminski wrote and cashed a check for $10,000 to herself and that Kaminski is the sole beneficiary of Slepicka's new trust (C. 498-499; C503), Kaminski's admission that she never told Holy Family Villa about the transfer of funds into the trust (C. 503-504), and Oettel's refusal to give the facility **financial** information when requested (C. 650). It is not the facility that **exploited** Slepicka **financially**.

C. IDPH did not err regarding the fact that Medicaid will not pay for Slepicka's stay in a non-Medicaid certified bed.

Plaintiff next argues that the ALJ erred in finding that "Medicaid will not pay for Ms. Slepicka's non-certified bed from April 10, 2011 to March 3, 2012." (Brief at p. 10). Plaintiff is wrong. The only evidence in the record on this point supports ALJ Giachello's finding. IDHFS sent a letter to Magurany as Administrator of Holy Family Villa on April 22, 2009 identifying the facility's distinct part for Medicaid purposes. (C. 638). The letter concludes:

> The Department [IDHFS] will not pay for the care of new admissions to the facility on or after April 1, 2009, unless the resident is residing in one of the Medicaid distinct part beds listed above.

(C. 638). Slepicka was admitted on March 29, 2011, after the date identified in the letter. She resided in Room 222, which does not contain Medicaid-certified beds. (C. 638). There was no testimony that contradicted the letter. Thus, it is undisputed that Medicaid will not pay for Slepicka's stay while in a private pay (non-certified) bed.

***23 VI. This appeal is moot.**

Despite the fact that IDPH correctly ordered Slepicka's involuntary transfer and discharge, this case is moot because Slepicka has now paid the amount owed and cannot be involuntarily discharged or transferred. 210 ILCS § 45/3-401(d).

"Illinois courts 'do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided."' *Wright Dev. Group, LLC v. Walsh,* 238 Ill. 2d 620, 632, 939 N.E.2d 389, 396 (2010) quoting *In re Alfred H.H.,* 233 Ill. 2d 345, 351, 910 N.E.2d 74 (2009). A moot case is one which, among other things, seeks to determine an abstract question which does not rest on existing facts or rights. *Mount Carmel High Sch. v. Illinois High Sch. Ass 'n,* 279 Ill. App. 3d 122, 124, 664 N.E.2d 252, 254 (1st Dist. 1996)

An appeal becomes moot when intervening events have rendered it impossible for the reviewing court to grant effective relief to the complaining party. *People v. Hernandez (In re Hernandez),* 239 Ill. 2d 195, 201, 940 N.E.2d 1082, 1086 (2010); *see also, Emerson Electric Co. v. Sherman,* 150 Ill. App. 3d 832, 835, 502 N.E.2d 414, 416 (1st Dist. 1986); *Mount Carmel High Sch.,* 279 Ill. App. 3d at 125. Once the appeal becomes moot, any opinion the court might enter would be purely advisory. *In re Hernandez,* 239 Ill. 2d at 201. "It is axiomatic that appellate jurisdiction is based upon the existence of a real controversy and, where only moot questions are involved, this court will dismiss the appeal." *LaSalle Nat'l Bank, N.A. v. City of Lake Forest,* 297 Ill. App. 3d 36, 42-43, 696 N.E.2d 1222, 1227 (2nd Dist. 1998). *See also, In re Hernandez,* 239 Ill. 2d at 205 (a moot appeal should be dismissed).

Holy Family Villa issued its Notice of Involuntary Discharge pursuant to 42 C.F.R. §483.12(a)(2)(v) which provides that a resident can be involuntarily transferred or ***24** discharged if "[t]he resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility." Section 483.12(a)(6)(iv) requires that the Notice of Involuntary Discharge provide the resident a right to appeal to the State. Thus, it is State law that governs Slepicka's request for hearing which lead to this appeal. Under Illinois law, payment of the past due bill terminates the involuntary discharge proceeding. The Nursing Home Care Act provides:

> The notice [of involuntary discharge] shall state, in addition to the requirements of Section 3-403 of this Act, that the responsible party has the right to pay the amount of the bill in full up to the date the transfer or discharge is to be made and then the resident shall have the right to remain in the facility. **Such payment shall terminate the transfer or discharge proceedings.**

210 ILCS § 45/3-401(d) (emphasis added).

While this appeal was pending, Slepicka and Kaminski availed themselves of Slepicka's right to pay the amount owed to remain in the facility. (SA13). Holy Family Villa cannot involuntarily transfer or discharge Slepicka now that she has paid what she owed; the involuntary transfer or discharge proceeding is terminated.

The only remedy sought by Holy Family Villa in the Notice of Involuntary Discharge is to discharge or transfer Slepicka to another Medicaid-certified facility, not to collect the amount owed. The involuntary discharge proceeding is not a civil action to collect the past due balance, nor does the Department or its ALJ have the power to order that the money be paid. Now that Holy Family Villa has been paid, there is no threat of involuntary discharge, and this appeal is moot. There is no longer any controversy between the parties; Slepicka's intervening payment of the past due balance has rendered it impossible for this Court to grant effective relief to any party with respect to the administrative proceeding which gave rise to this appeal.

***25 VII. The Circuit Court lacked and, therefore, this Court lacks, subject matter jurisdiction.**

Slepicka's appeal should be dismissed for the independent reason that the Circuit Court lacked subject matter jurisdiction to hear this case and, therefore, this Court also lacks subject matter jurisdiction. It is well established that subject matter jurisdiction cannot be waived, conferred by stipulation, or consented to by the parties. *City of Marseilles v. Radke*, 287 Ill. App. 3d 757, 761, 679 N.E.2d 125, 128 (3d Dist. 1997). Subject matter jurisdiction can be attacked at any time and is an argument that "cannot be forfeited." *In re John C.M.*, 382 Ill. App. 3d 553, 558, 904 N.E.2d 50, 56 (4th Dist. 2008). A challenge to subject matter jurisdiction can be raised for the first time at any stage of the proceedings, even on appeal. *Jones v. Indus. Comm 'n*, 335 Ill. App. 3d 340, 343, 780 N.E.2d 697, 700 (3d Dist. 2002); *see also Geise v. Phoenix Co. of Chi.*, 159 Ill. 2d 507, 515, 639 N.E.2d 1273, 1276 (1994).

Although circuit courts have original jurisdiction of justiciable matters, when the circuit court sits as an appellate court pursuant to the Administrative Review Law, it is exercising special statutory jurisdiction. *Rodriguez v. Sheriff's Merit Comm 'n*, 218 Ill. 2d 342, 350, 843 N.E.2d 379, 383 (2006). When a circuit court exercises its special statutory jurisdiction, that jurisdiction is limited to the strict language of the statute conferring the power, and the circuit court has no powers from any other source. *Fredman Bros. Furniture Co. v. Dep't of Rev.*, 109 Ill. 2d 202, 210, 486 N.E.2d 893, 895-896 (1985). "In the exercise of special statutory jurisdiction, if the mode of procedure prescribed by statute is not strictly pursued, no jurisdiction is conferred on the circuit court." *Id.;* see also ***26** *Rodriguez v. Sheriff's Merit Comm'n of Kane Cnty.*, 218 Ill. 2d 342, 350, 486 N.E.2d 893, 896 (2006); *People v. Grau*, 263 Ill. App. 3d 874, 877, 636 N.E.2d 1085, 1087 (2d Dist. 1994).

Slepicka concedes that she appealed IDPH's Final Order under the Administrative Review Law and that the appeal was made under the special statutory jurisdiction set forth in the Administrative Review Law. (Record, Vol. V, 8:1-16.) As a result, the appeal was made pursuant to the Circuit Court's special statutory jurisdiction, and Slepicka was required to *strictly* follow the

mode of procedure prescribed by the Administrative Review Law in order to confer jurisdiction on the Circuit Court. Rodriguez, 218 Ill. 2d at 350; *Fredman Bros. Furniture Co.*, 109 Ill. 2d at 210; *Grau*, 263 Ill. App. 3d at 877.

The Administrative Review Law prescribes the mode of procedure that must be followed to confer jurisdiction as follows:

> Jurisdiction to review final administrative decisions is vested in the Circuit Courts,... If the venue of the action to review a final administrative decision is expressly prescribed in the particular statute under authority of which the decision was made, such venue shall control, but if the venue is not so prescribed, an action to review a final administrative decision may be commenced **in the Circuit Court of any county in which (1) any part of the hearing or proceeding culminating in the decision of the administrative agency was held, or (2) any part of the subject matter involved is situated, or (3) any part of the transaction which gave rise to the proceedings before the agency occurred.** The court first acquiring jurisdiction of any action to review a final administrative decision shall have and retain jurisdiction of the action until final disposition of the action.

735 ILCS § 5/3-104 (emphasis added).

Slepicka failed to follow the prescribed mode of procedure. Under the Administrative Review Law, the only circuit court with subject matter jurisdiction was the Cook County Circuit Court. The Nursing Home Care Act does not prescribe venue, ***27** therefore, the three part test of Section 3-104 governs. Under all three parts, Cook County is the only proper forum. First, the situs of the hearing and proceeding culminating in the Final Order was at Holy Family Villa, in Palos Park, Cook County. Second, the subject matter of the case, the involuntary transfer and discharge of Slepicka from Holy Family Villa, was situated in Cook County. Third, the entirety of the transaction giving rise to the proceedings before IDPH, Slepicka's failure to pay for her stay, occurred in Cook County.

Slepicka deviated from the mode of procedure prescribed by the Administrative Review Law, and opted to file suit in Sangamon County, presumably because it was more convenient for her attorney. To justify this decision, Slepicka argues that the Final Order may have been issued out of Springfield, and that it was mailed from Springfield. (C. 160-165.) Taken to its logical conclusion, administrative agencies could manipulate jurisdiction by signing orders or mailing them from far flung counties. Under this reading, even the Circuit Court agreed that "almost every administrative agency - every case can be reviewed here in Sangamon County, which is scary." (Record, Vol. V, 17:14-16.)

The problem with this position is that the Administrative Review Law cuts off the forum selection with the termination of the hearing or proceeding. Section 3-104 places venue in any county where any part of the hearing or proceeding *culminating* in the decision of the administrative agency was held, *not* in any county where the hearing or proceeding was held *or the decision was rendered.* By extending the choice of forum to the situs where the Final Order may have been signed, Slepicka, and the Circuit Court, have changed the meaning of the law. Moreover, the Office of the Director of IDPH has ***28** two offices, one in Springfield and one in Chicago. Surely the Court's jurisdiction cannot depend upon where the Director or his designee is sitting at the time the Final Order is signed.

While phrased as venue in the Administrative Review Law, forum selection is jurisdictional due to the limited nature of the jurisdiction conferred. However, the choice of the term "venue," was not an accident. The Administrative Review Law embodies conventional venue concepts in the forum selection criteria, in an apparent effort to ensure that cases are appealed in the circuit courts that have some connection to the underlying proceedings. Here, there is no connection, and there was no legal basis for filing the case in Sangamon County. Slepicka's failure to strictly follow the procedures set forth under the Administrative Review Law deprived the Circuit Court in this case of jurisdiction to hear Slepicka's Complaint for Administrative Review. *See Grau*, 263 Ill. App. 3d at 877 ("The Administrative Review Act is the exclusive means for review of such decisions. Thus, defendant did not comply with the Act in this case, as no complaint for administrative review was filed, and venue in McHenry

County was improper. The court therefore lacked jurisdiction to order the Secretary to reinstate defendant's driving privileges."). Lacking jurisdiction over this matter, the case must be dismissed. *See Rodriguez,* 218 Ill. 2d at 356 - 57; Geise, 159 Ill. 2d at 516.

***29 CONCLUSION**

Plaintiff's only real complaint in this case is that Holy Family Villa did not move Slepicka into a Medicaid-certified bed at some unspecified date (for some unspecified reason) earlier than March 4, 2012. However, the facts are undisputed that Slepicka, Kaminski and Oettel worked secretly, refusing to tell Holy Family Villa that they were hiding Slepicka's assets, thereby rendering her unable to pay for her care. The only **financial** information that Slepicka or Kaminski gave to Holy Family Villa was that Slepicka had sufficient assets to pay for at least three years of care. They never gave Holy Family Villa any reason to move Slepicka into another bed. Although unfortunate, they, not Holy Family Villa, created Slepicka's problem.

Slepicka or Kaminski or Oettel could have avoided this problem by waiting until Slepicka resided in a Medicaid-certified bed to transfer her assets. It was Slepicka's choice. However, none of this changes the fact that the law allows a facility to involuntarily transfer or discharge a resident for failure to pay for a private pay stay while in a private pay bed. Plaintiff has failed to demonstrate that the Final Order is against the manifest weight of the evidence. The Final Order should be affirmed.

Footnotes

1 42. C.F.R. § 483.12 was amended on March 19, 2013, but the amendment is not material to any issue in this case. *See* 78 Fed. Reg. 16805.

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